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No. 89-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JEFFREY M. MASSON,

Petitioner,

v.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC. and
JANET MALCOLM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The news organizations filing this brief with the consent of the parties as *amici curiae* have a vital interest in the outcome of this case. Petitioner seeks to make the courts and juries arbiters of journalistic standards and ethics. The court below correctly refused to modify its constitutional inquiry to incorporate such standards. In-

stead, the court applied settled constitutional standards for granting summary judgment in libel cases. *Amici* seek affirmance of that process and the decision in this case. The decision below does not support or require either a rule that constitutionally immunizes fabricated quotations or a rule imposing constitutionally mandated standards of journalism.

Amici bring to this case the perspective of a substantial segment of the nation's media who are directly affected by this Court's decisions in the areas of first amendment protections. The Reporters Committee for Freedom of the Press ("the Reporters Committee") is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the first amendment interests of the news media. Since 1970, the Reporters Committee has provided representation, information, legal guidance or research in press freedoms cases throughout the country.

The American Newspaper Publishers Association ("ANPA") is a nonprofit trade association representing approximately 1,400 newspapers. ANPA's membership constitutes approximately 90 percent of the total daily and Sunday newspaper circulation in the United States, as well as a substantial portion of the non-daily newspaper circulation. These newspapers have the basic function of gathering and disseminating news and information.

The Radio-Television News Directors Association, with a membership of more than 3,600 persons, is the principal professional organization of journalists—executives, editors, reporters and others—who gather and disseminate news and other information on radio and television in the United States.

The Society of Professional Journalists is a voluntary, nonprofit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism. Preservation of

first amendment freedoms is of deep concern to the Society.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of the case and facts as set forth by respondents.

SUMMARY OF ARGUMENT

This case does not present reasons for either expanding or limiting the established "constitutional zone of protection" for errors of fact. *Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971). Existing constitutional guidelines provide the proper rules of decision in this case. Petitioner's efforts to change those guidelines to reflect or impose journalistic standards are unwarranted and inappropriate.

The court below correctly applied this Court's settled standards for granting summary judgment in a public figure libel case: it examined the circumstances of petitioner's case to determine whether a reasonable jury could find that respondents published material that was substantially untrue and defamatory, and that respondents did so with serious doubts about the truth of the allegedly defamatory publication. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512-13 (1984). Because petitioner did not satisfy this burden of proof, summary judgment for respondents was granted. The court below conducted the appropriate constitutional inquiry, an inquiry which this Court has determined strikes the necessary balance between first amendment protections and individual rights in libel cases. *See Milkovich v. Lorain Journal, Inc.*, 497 U.S. ——, 110 S. Ct. 2695 (1990).

ARGUMENT

I. THIS CASE OFFERS NO JUSTIFICATION FOR ALTERING THE EXISTING CONSTITUTIONAL BALANCE IN DECIDING MOTIONS FOR SUMMARY JUDGMENT IN LIBEL CASES

Established guidelines that balance first amendment protections with the rights of individuals are adequate to decide the outcome of this case; it is not necessary or appropriate to develop any additional first amendment protection. *See Milkovich*, 497 U.S. ——, 110 S. Ct. 2695 (1990). While this is a highly publicized case, it nonetheless presents no new first amendment issues. The case may fairly raise questions as to the proper application of this Court's established rules, but it does not stand for the proposition that the Constitution gives "license to invent quotations." *Masson v. New Yorker Magazine*, 895 F.2d 1535, 1553 (9th Cir. 1989) (Kozinski, J., dissenting). Nor is it a basis for a determination that inaccurate quotations warrant no first amendment protection.

This Court has established the appropriate inquiry for a motion for summary judgment in a public figure libel case:

> Where a factual dispute concerns actual malice . . . the appropriate summary judgment question will be whether the evidence in the record can support a reasonable jury finding . . . that plaintiff has shown actual malice by clear and convincing evidence.

Anderson, 477 U.S. 242, 255-56 (1986). This guideline requires a court to test the objective falsity of the allegedly defamatory publication and, under the standard of clear and convincing evidence, the publisher or writer's subjective knowledge or disregard of its falsity. *Id.* at 252; *Bose*, 466 U.S. at 510-11; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The court below

adhered to this standard in affirming summary judgment for respondents.

This inquiry makes clear that summary judgment is neither properly granted nor denied based on the bare assertions of either party. *See, e.g., Anderson*, 477 U.S. at 252 ("mere existence of a scintilla of evidence . . . insufficient" to satisfy the clear and convincing evidence standard as there must be evidence on which the jury could reasonably find for plaintiff); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (libel defendant cannot insure favorable verdict by asserting belief that statements were true; finder of fact must determine if publication made in good faith).

Similarly, the existence of demonstrable inaccuracies in a quoted statement does not automatically create a triable issue of fact on actual malice. Summary judgment is proper where the statement is substantially true or where it was reasonably believed by the publisher to be true. Guided by the clear and convincing evidence requirement, this Court has determined that evidence which is "merely colorable" or "not significantly probative" is not sufficient to overcome summary judgment. *Anderson*, 477 U.S. at 250 (citations omitted); *see also Bose*, 466 U.S. at 513 (1984) (inaccuracies in published materials are expected in a "forum of robust debate"). If the substantial truth of the statement is not examined as probative of actual malice at summary judgment, then every claim of inaccuracy, regardless of its merits or triviality, will result in a trial.

In assessing evidence of actual malice, the alteration of quoted material is to be treated like all other assertions of fact. Quotes are subject to a myriad of potential criticism, each producing the claim that the quotes were "deliberately altered." Petitioner here alleged that his quoted statements were untrue for a number of reasons commonly asserted in libel cases: petitioner claimed

some quotes were false for what was made up; some for what was put in; some for what was left out; some for where it was said; some for when it was said; and some for what was implied by what was said.

The court below was satisfied that the substance of the quotations at issue was not the product of the writer's imagination or completely fabricated. *E.g.*, 895 F.2d at 1541. Presented with claims that the quotations nevertheless were substantially untrue, the court below carefully examined the petitioner's evidence regarding allegedly altered or inaccurate quotations. The court made the required independent examination of the record, and determined that a reasonable jury could not conclude that they were substantially untrue or incorrect. 895 F.2d at 1539-46.

The court also correctly examined all the circumstances to see if a reasonable jury could find by clear and convincing evidence that respondents entertained serious doubts about the truth of the publication. The court found that respondents did not publish the articles with such actual malice. *Id.*

Inherent in these findings is the court's determination that the job of editing must remain with the editor. This Court has recognized that the nature of the media's task requires editorial decisions and the exercise of judgment in selecting portions of statements and in choosing whether and how selected material shall be presented. *See Bose*, 466 U.S. at 512-13 (editorial choice of one of a number of possible interpretations, "though reflecting a misconception, does not place the speech beyond the outer limits of the first amendment's broad protective umbrella"); *Pape*, 401 U.S. at 289-90 (adoption of one of a number of possible rational interpretations of an ambiguous document is not denied first amendment protection). These cases establish that editorial latitude is essential to first amendment values of free expression and full debate.

The decision below does not create a constitutional right to misquote intentionally or recklessly, or a constitutional right to report false facts intentionally or recklessly. *Amici* urge affirmance of the decision below because the court appropriately invoked established constitutional standards, and conducted an inquiry to determine whether petitioner showed by clear and convincing evidence that respondents acted in reckless disregard for the truth in allegedly misquoting or inaccurately quoting the petitioner. This Court has determined that such an inquiry accommodates both the open and robust debate protected by the first amendment and an individual's right to challenge allegedly defamatory statements that are published intentionally or with reckless disregard for the truth. *Milkovich*, 497 U.S. ——, 110 S. Ct. 2695, 2707-08 (1990).

II. IT IS INAPPROPRIATE AND UNNECESSARY FOR A COURT TO APPLY JOURNALISTIC STANDARDS OR ETHICS WHEN DECIDING WHETHER A LIBEL PLAINTIFF'S CASE SATISFIES THE REQUIREMENT OF CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE

This Court emphasized in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ——, 109 S. Ct. 2678 (1989), that even a showing of "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" is not sufficient to establish actual malice. *Id.* at 2684-85, *quoting Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). Yet petitioner urges this Court to rely upon such standards to do precisely that, maintaining that these extra-legal standards

> will help the Court evaluate whether, under the circumstances, the false speech that it is being asked to protect is 'of a character' protected by the First Amendment.

Petitioner's Brief at 24. *Amici* urge the Court to abide by well-established precedent and refuse to undertake the evaluation suggested by petitioner.

The problems inherent in the adoption of a "constitutional standard of journalism" are amply illustrated by Judge Kozinski's dissent in the Court of Appeals. 895 F.2d at 1548-70. The dissent notes the extensive debate about, and condemnation of, misquotes or inaccurately stated quotations, citing textbooks, journalism manuals, trade articles and even comments by the former Editor-in-Chief of *The New Yorker* magazine. *Id.* at 1558-62. The dissent argues that since false quotes are widely condemned they should be distinguished from other kinds of false or erroneous facts which may be published, and excluded from the constitutional protection otherwise afforded vigorous and even unpleasant discussion.

The continuing debate over what are proper journalistic ethics suggests that such standards are not useful measures of constitutional protections. It is inappropriate to base constitutional protections on such ethical standards, particularly when, because of the first amendment, the state may not license or impose standards in regulation of journalists as it does for the legal and medical professions. Furthermore, these ethical standards may not necessarily apply with equal force to all sources and publications. Such standards are certainly no easier to use than the existing constitutional rules. Indeed, the constitutional rules were designed to protect the function of editors and the necessary editorial discretion to embrace potentially conflicting ethical judgments made by authors and editors.

This Court repeatedly has rejected claims that all practices that would be "good" or "fair" journalism can be imposed by the power of the state. *E.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a statute requiring newspapers to give equal space to candidates the newspaper criticizes); *Curtis Publishing Company v. Butts*, 388 U.S. 130, 155 (1967) (recognizing that public official must show more than departure from professional standards to prove actual malice); *see also St. Amant v. Thompson*, 390 U.S. at 731 (1968) (*New York Times* and its progeny make clear that "reckless conduct is not measured by whether a reasonably prudent man" would have published the material at issue).

The continuing debate over journalistic ethics shows that a "bright line" test as to accuracy of quotes is not an adequate measure of substantial truth. *See Pape*, 401 U.S. at 286 (recognizing the set of choices confronting an editor when departing from full direct quotation); *see also Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970) (protecting use of the word "blackmail" when material containing that word cannot reasonably be interpreted as stating an actual fact). The inaccurate or altered quote is not a goal of good journalists. But standing alone, a change in words without a change in meaning is not a sufficient basis to strip the reporting and editorial process of the protections accorded speech.

The first amendment does not protect only "ethical" journalists. The history of speech in this country shows that unpleasant and extreme speech is tolerated not because it is model journalism, but because it is necessary to protect the process by which we seek to inform ourselves of the full range of ideas and expression.

Amici suggest that the pressures of the public, the marketplace and the journalistic community properly and adequately discipline transgressions such as those alleged by petitioner here. This Court has determined that absent clear and convincing evidence of serious doubts as to truth, we rely upon public figures to correct inaccurate statements or quotes through further speech, rather than placing upon each reporter the obligation of reporting with what is later determined by a court to be stenographic accuracy. Journalistic standards and ethics may dictate that altered quotations are not appropriate, but these guidelines should not be the basis for new constitutional standards.

CONCLUSION

For the reasons stated above, *amici* Reporters Committee for Freedom of the Press, American Newspaper Publishers Association, Radio-Television News Directors Association, and the Society for Professional Journalists urge that the decision of the court below be affirmed.

Respectfully submitted,

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